No. 04-1527

IN THE

Supreme Court of the United States

S.D. WARREN COMPANY,

Petitioner,

v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

ON WRIT OF CERTIORARI TO THE
MAINE SUPREME JUDICIAL COURT

BRIEF OF THE STATES OF NEW YORK, WASHINGTON, ALASKA, ARIZONA, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, KENTUCKY, LOUISIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WEST VIRGINIA, WISCONSIN, THE COMMONWEALTH OF PUERTO RICO, THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, AND THE INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Amici curiae States, the Commonwealth of Puerto Rico, the Pennsylvania Department of Environmental Protection ("PADEP"), and the International Association of Fish and Wildlife Agencies ("IAFWA") respectfully urge affirmance of the Maine Supreme Judicial Court's decision in *S.D. Warren Co. v. Board of Environmental Protection*, 2005 ME 27, 868 A.2d 210, holding that Section 401 of the Clean Water Act ("Act"), 33 U.S.C. § 1341, authorizes the State of Maine to issue a "certification" imposing conditions on the operation of Petitioner S.D. Warren's hydroelectric dam facilities as a prerequisite to the issuance of any federal license or permit to Petitioner by the Federal Energy Regulatory Commission ("FERC").[1]

There are over 1,500 federally licensed hydroelectric dam facilities throughout the nation. Since the early 1970s, States have used their Section 401 certification authority to limit pollution caused by these facilities. Without state oversight under Section 401, the operation of hydroelectric dams would degrade significantly the chemical, biological, and physical integrity of affected waters. For example, water released from hydroelectric dam impoundments often has reduced levels of dissolved oxygen, which can cause fish to suffocate. Such water also may be significantly warmer or colder than natural conditions, and cold-water fish such as salmon and trout

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1. Under Rule 37.4 of this Court, *amici* States are not required to obtain consent to the filing of this brief. The parties have consented to the filing of this brief by PADEP, a state agency, and the IAFWA, a not-for-profit corporation whose members include the fish and wildlife agencies of all fifty States, the Commonwealth of Puerto Rico, and seven Canadian provinces and territories, as well as federal and dominion agencies having jurisdiction and responsibility for fish and wildlife resources. This brief was not written in whole or part by counsel for a party, and no one other than *amici* made a monetary contribution to its preparation and submission.

cannot long survive in warm waters. A dam may permanently impede the travel of salmon, trout, and other species of fish that regularly move between inland waters and the ocean, leaving large stretches of river devoid of such fish. Hydroelectric facilities that "fill and spill" in order to optimize the generation of power during periods of peak demand cause the surface level of waters to fluctuate, which can erode exposed banks, and drain or flood adjacent wetlands. The mechanical grind of hydroelectric turbines often kills large numbers of fish that pass downstream. Sediment with contaminants can build up behind dams, harming bottom-dwelling organisms and causing the accumulation of contaminants in higher-level aquatic species that feed upon them. In short, the operation of a hydroelectric dam can significantly impair recreational and commercial fishing and boating, and destroy wetland and river areas absent carefully designed conditions imposed to protect water quality.[2]

Congress has left no doubt that the States are authorized to regulate water pollution generally. Indeed, the Act expressly recognizes the States' primary role in ameliorating such pollution. *See* 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . ."); *see also id.* § 1370 (providing that the States are not precluded from enforcing any pollution abatement requirement, so long as state standards meet or exceed federal standards). The state oversight authorized by Section 401 is especially critical to controlling the adverse

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2. *Amici* recognize that hydroelectric facilities provide renewable energy and other benefits, such as water supply and recreation. These benefits can coexist with protections against the potential adverse water quality effects of these facilities. Indeed, because of Section 401, States and hydropower licensees frequently work together to develop such mutually beneficial solutions.

impacts that result directly from the operation of hydroelectric dams because state regulation of such dams is otherwise largely preempted by the Federal Power Act, *see* 16 U.S.C. § 791a *et seq.*, and no other provision of the Clean Water Act allows the States adequately to address dams' effects. Exempting the operation of hydroelectric dams from the reach of Section 401 would seriously undermine the States' authority under the Act to protect their citizens, economies, and environment, and *amici* therefore have a strong interest in affirmance of the decision below.

SUMMARY OF ARGUMENT

I. Petitioner's contention that Section 401's state certification requirement does not apply to the operation of hydroelectric dam facilities is incompatible with the plain language of that provision. State certification is required for any federally licensed or permitted activity that "may result in *any discharge* into the navigable waters." 33 U.S.C. § 1341(a)(1) (emphasis added). The term "any discharge," by its plain meaning, sweeps more broadly than the narrower phrase "discharge of any pollutant" – language from Section 402 of the Act, *id.* § 1342, that Petitioner would import into Section 401 to limit the grounds for state certification. The Act's definitional provision confirms Section 401's more expansive reach. It states that a "discharge," as used in Section 401, "*includes* a discharge of a pollutant." *Id.* § 1362(16) (emphasis added). In other words, every "discharge of a pollutant" is a "discharge," but not every "discharge" is a "discharge of a pollutant."

The purpose and structure of the Act as a whole confirm this conclusion. Congress expressly recognized the need to address "pollution resulting from . . . changes in the movement, flow, or circulation of any navigable waters . . . ,

including changes caused by the construction of dams." *Id.* § 1314(f)(2)(F). Importantly, such "pollution," as defined by the Act at 33 U.S.C. § 1362(19), may occur even in the absence of any "pollutant," such as where a hydroelectric dam alters the water's movement or flow, or otherwise affects its physical, chemical, or biological integrity. State certification under Section 401 is the most effective means for the States to address the pollution caused by such facilities, and that tool must remain available to accomplish the Act's objective of maintaining the integrity of the Nation's waters. *See id.* § 1251(a). Equally significant, Petitioner's reading of the Act would severely impair the States' ability to preserve their water quality standards – standards that the Act itself requires each State to develop and achieve for each water body. *Id.* § 1313(c)(2)(A); 40 C.F.R. §§ 131.10, 131.11.

The relevant legislative history further affirms that Section 401 applies to hydroelectric dam facilities. Legislators instrumental to the enactment of Section 401 explicitly recognized that hydroelectric dams would be subject to state certification. Moreover, Section 401's certification requirement was adopted in 1970, two years before the enactment of Section 402's National Pollutant Discharge Elimination System ("NPDES") permit program, making clear that Section 402's limitations should not be read into Section 401.

II. Petitioner's construction of Section 401 is contrary to *PUD No. 1 v. Washington Department of Ecology*, 511 U.S. 700 (1994). There, the Court expressly concluded that state certification was necessary to operate a hydroelectric dam facility because the facility would "discharge" water after using it to generate electricity. *Id.* at 709, 711. That conclusion, which was necessary to the Court's decision approving the Section 401 certification challenged in *PUD No. 1*, is sound and should be given *stare decisis* effect.

South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004), upon which Petitioner relies, is not to the contrary. That case did not construe Section 401's "any discharge" standard, but rather the distinct "discharge of any pollutant" standard of Section 402. Because the Act expressly defines "discharge of a pollutant" as an "addition" of a pollutant to navigable waters from a point source, *see* 33 U.S.C. § 1362(12), the *Miccosukee* Court looked to whether any pollutant had been *added*, via a point source, from a "meaningfully distinct" water body. 541 U.S. at 109-112. But a "discharge" within the meaning of Section 401 may occur regardless of whether there has been any addition to navigable waters, so *Miccosukee*'s reasoning is not applicable to Section 401.

ARGUMENT

I. HYDROELECTRIC DAM OPERATIONS CONSTITUTE A "DISCHARGE" SUBJECT TO STATE CERTIFICATION PURSUANT TO SECTION 401 OF THE CLEAN WATER ACT.

The Supreme Judicial Court of Maine held that Petitioner, as the operator of five federally-licensed hydroelectric dams, must obtain a water quality certification from the State of Maine pursuant to Section 401 of the Act. That holding is consistent with the plain text of Section 401, the purpose and structure of the Act, and the legislative history underlying Section 401 – all of which demonstrate that Congress intended that Section 401's certification requirement apply to the operation of hydroelectric dams. Accordingly, the decision of Maine's highest court should be affirmed.

A. The Plain Text of Section 401 Covers "Discharges" From Hydroelectric Dams.

Statutory construction begins with the plain text of the statute. *Watt v. Alaska*, 451 U.S. 259, 265 (1981). Section 401(a)(1) directs that "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate." 33 U.S.C. § 1341(a)(1). Thus, "any discharge" associated with "any activity" that requires a federal license or permit triggers the State's authority to: (i) issue or deny the required certification; or (ii) place conditions or limitations on its certification to assure that the activity does not violate certain of the Act's requirements or "any other appropriate requirement of State law." *PUD No. 1*, 511 U.S. at 711-14; 33 U.S.C. § 1341(d).

"Congress expresses its purposes through the ordinary meaning of the words it uses," *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984), and the "ordinary" meaning of the word "discharge" in Section 401 plainly encompasses water flowing from the dam of a hydroelectric facility. *See* Webster's Ninth New Collegiate Dictionary 360 (1986) (defining the verb "discharge" to mean "to let go," "to release from confinement," "to give outlet or vent to," and to "emit," and defining the noun "discharge" as "the act of . . . release," "a flowing out," "a rate of flow," and "something that is emitted").

Moreover, the Act's definitional section makes clear that the word "discharge," as used in Section 401, is to be construed broadly. It states that "[t]he term 'discharge' when used without qualification *includes* a discharge of a pollutant" or pollutants. 33 U.S.C. § 1362(16) (emphasis added).

Congress' use of the word "includes" is significant. In contrast, each of the other 23 definitions set forth in 33 U.S.C. § 1362 — including the definition of "discharge of a pollutant" in 33 U.S.C. § 1362(12) — uses the more restrictive word "means." As this Court has observed, "where 'means' is employed, the term and its definition are to be interchangeable equivalents"; by contrast, "the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition." *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125-26 n.1 (1934); *see also Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1098 (9th Cir. 1998) ("'Discharge' is the broader term [as compared with 'discharge of a pollutant'] because it includes all releases from point sources, whether polluting or nonpolluting."); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 172 (D.C. Cir. 1982) ("As a general rule, . . . 'means' . . . excludes any meaning that is not stated," "rather than the looser phrase 'includes.'" (internal quotation marks omitted)).

Petitioner's effort (Pet. Br. 16-17, 21-22) to incorporate Section 402's "discharge of any pollutant" standard into Section 401 is counter to the Act's plain language.[3] By its express terms, Section 401 is triggered not only by the discharge of pollutants but, far more broadly, by "*any* discharge." 33 U.S.C. § 1341(a)(1) (emphasis added). Moreover, by requiring an applicant for a federal license or permit to obtain a certification for "any activity . . . which *may result* in any discharge into the navigable waters," Section 401, unlike Section 402, is triggered not only by an actual discharge, but by the mere possibility of any discharge (whether of a pollutant or otherwise). *Id.* § 1341(a)(1) (emphasis added). Had Congress intended to restrict Section 401's reach to the actual discharge of pollutants, it easily

3. Section 402 of the Act establishes a NPDES permit requirement for the "discharge of any pollutant" into navigable waters from any "point source" (*i.e.*, conveyance). *See* 33 U.S.C. § 1342.

could have done so. It chose instead to extend Section 401's coverage to activities that "may result in any discharge," and this Court should reject Petitioner's invitation to equate the disparate language in Sections 401 and 402.

Nor, contrary to Petitioner's chief assertion (Pet. Br. 14-20, 22-23), does the phrase "any discharge" mean the "addition" of some foreign substance to navigable waters. No addition is connoted by the ordinary meaning of "discharge," *see supra*, and the Act's definition of "discharge," as used in Section 401, makes no mention of an "addition." *See* 33 U.S.C. § 1362(16). By contrast, "*discharge of a pollutant*" — as used in Section 402 — is expressly defined as "any *addition of any pollutant* to navigable waters from any point source." *Id.* § 1362(12) (emphasis added). It is a well-established principle of statutory construction that "when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (internal quotation marks omitted). Thus, the term "any discharge," as used in Section 401, should not be interpreted to mean the addition of a pollutant or other substance.

Because the hydroelectric dam facilities operated by Petitioner "may result in any discharge," Maine properly imposed various operational and structural conditions on the dams pursuant to Section 401 to address their adverse impacts. *See* Pet. App. A25-A29. Indeed, Petitioner's own characterization of the activities of its hydroelectric dam facilities leaves little doubt that their operations "result" in "discharges" subject to Section 401 certification. *See* 33 U.S.C. § 1341(a)(1). As Petitioner describes it, its dams result in the channeling of water into a "'power canal,' past the turbines, and then back into the riverbed through

the 'tailrace channel,'" in a manner that "affect[s] the movement and flow of the" river by "causing less dissolved oxygen to be retained in the water," "impacting habitat for aquatic organisms," and "chang[ing] the nature of the river's recreational uses" (Pet. Br. 3-4).[4] These activities qualify as a "discharge" that triggers the Act's certification requirement.

B. Petitioner's Interpretation of Section 401 Would Frustrate the Purposes of the Clean Water Act.

Petitioner would have this Court construe Section 401's certification requirement as reaching only activities that involve the addition of a pollutant or similar substance. Not only does that interpretation lack support from the text of Section 401, but it would thwart the Act's fundamental "objective" of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).[5]

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4. The hydroelectric dam facilities at issue here function differently than the diversion dam and associated canal and mills discussed by *amicus curiae* Augusta, Georgia. The Court's decision in this case should in no event exempt the Augusta project from Section 401 certification, particularly since it spans two states, impairs river navigation, degrades important spawning habitat, impedes the migration of fish, and has other adverse impacts on water quality.

5. Of course, where a State determines that the federally-licensed facility or its discharge poses no possibility of impairing water quality or causing "pollution," the State may simply issue the certification without conditions. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 n.9 (1985) (noting that where the pollution-prevention purpose of an environmental program is not genuinely implicated, the solution is "simply [to] issu[e] a permit"). Thus, Section 401 certification furthers the Act's goals without imposing undue burdens on applicants, the States, or involved federal agencies.

1. Section 401 Is Intended to Give the States Broad Authority to Remedy "Pollution" of Their Water Bodies, Including Pollution Caused by Hydroelectric Dams.

Congress expressly recognized the need to allow States to remedy all "pollution resulting from . . . changes in the movement, flow, or circulation of any navigable waters . . . , including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." *Id.* § 1314(f)(2)(F). The Act defines "pollution" broadly to encompass "the man-made or man-induced alteration of the chemical, physical, [and] biological . . . integrity of water." *Id.* § 1362(19).

Hydroelectric dam facilities may cause pollution, as defined by the Act, in several different ways. First, dams may severely alter the "chemical integrity" of local waters. In both waters upstream of dams (including reservoirs) and waters downstream, dams often lower dissolved oxygen levels, thus suffocating or driving off fish. Hydroelectric dam facilities may discharge or, by changing the flow regime, otherwise lead to high levels of dissolved minerals and nutrients such as iron, manganese, and phosphates. Dams also lead to water temperatures that are too high or too low for affected fish species, as well as to the build-up and release of sediment. *Gorsuch*, 693 F.2d at 161-64; Pet. App. A-51, A-56, A-58; *see also Nat'l Wildlife Fed'n v. Gorsuch*, 530 F. Supp. 1291, 1297-1303 (D.D.C. 1982), *rev'd*, 693 F.2d 156 (D.C. Cir. 1982).

Rather obviously, damming a river also changes its "physical integrity." Dams may create huge lakes, flooding upstream areas and limiting downstream flow (Pet. App. A-75 to A-77). Wetlands both upstream and downstream often are harmed by the rapid draining and flooding of the river

(Pet. App. A-116 to A-117). Indeed, dams can reduce or eliminate water in the "by-pass reach" – the stretch of river from which water is diverted for use in the electric generators – essentially destroying that portion of the water body (Pet. App. A-26 to A-27, A-49, A-78, A-89).

Hydroelectric dams further can harm the "biological integrity" of affected waters by changing conditions both downstream and upstream.[6] Such facilities may bar the upstream passage of fish, eels, and other aquatic organisms that move from ocean to inland water to spawn (Pet. App. A-27 to A-28, A-49, A-71, A-75 to A-77, A-89). Fish traveling downstream, too, often are killed or injured by the hydroelectric turbines. For example, one particularly large "pump-storage" hydroelectric generation facility was found to destroy a "substantial number" of fish and other organisms during normal operations, to the extent that "[m]illions of pounds of live fish, dead fish and fish remains [were] annually discharged into Lake Michigan." *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 582-83 (6th Cir. 1988). [7]

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6. In fact, a recent report by the California Energy Commission found that hydropower has a greater impact on California's natural resources than all other electricity generation sectors. *See* California Energy Commission, Environmental Performance Report of California's Electric Generation Facilities, Publication # 700-01-001 (July 2001), *available at* http://www.energy.ca.gov/reports/2001-06-28_700-01-001.pdf.

7. Petitioner attempts to minimize the serious harm caused by hydroelectric dams by variously likening this activity to taking a "ladle of soup from a pot, lift[ing] it above the pot, and pour[ing] it back into the pot," or characterizing it as "merely taking control over water in a man-made facility to cause it to travel from one point to another" (Pet. Br. 21). There is nothing "mere" about the adverse impacts on a river system typically caused by hydroelectric dam facilities (*e.g.*, lack of fish passage, low dissolved oxygen, gaseous supersaturation of water, reduced flow), and nothing akin to a "soup ladle" in the massive structures, flow changes, sediment depositions, and water impoundments associated with hydroelectric dams.

Any reading of Section 401 that deprives the States of their authority to regulate the activities of facilities known to seriously impair the chemical, physical, and biological integrity of the Nation's waters runs counter both to the Act's objective of addressing water pollution, and to the "primary" authority the Act confers upon the States to achieve this goal. 33 U.S.C. § 1251(a), (b). State authority over hydroelectric dams is generally otherwise preempted by the Federal Power Act, 16 U.S.C. § 791a *et seq.*,[8] and Section 401's certification process is the most effective means by which the States may regulate the activities of such facilities. *See, e.g., PUD No. 1*, 511 U.S. at 719-20 (discussing 33 U.S.C. § 1251(g) and 33 U.S.C. § 1314(f) as a basis for finding that States may impose a broad array of Section 401 controls on the entire activity associated with a hydro-power facility).

It is highly implausible that Congress would grant the States authority to address "pollution" resulting from a federally licensed activity, but at the same time dramatically limit the circumstances in which the States may exercise this authority.[9] Petitioner can identify no indication that Congress

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8. *See California v. FERC*, 495 U.S. 490, 498 (1990); *Sayles Hydro Ass'n v. Maughan*, 985 F.2d 451, 453 (9th Cir. 1993) (holding that the Federal Power Act "occupie[s] the entire field"); *American Rivers, Inc., v. FERC*, 129 F.3d 99, 111 (2nd Cir. 1997) (noting that the Clean Water Act has "diminished" the Federal Power Act's "preemptive reach by expressly requiring [FERC] to incorporate into its licenses state-imposed water-quality conditions").

9. There is no merit to Petitioner's suggestion that 33 U.S.C. § 1314(f)(2)(F) demonstrates that Congress did not intend to allow States to address dam-induced impairment to water quality through Section 401's certification process (Pet. Br. 23-25). This Court has held that Section 401 authorizes the States, through the certification process, to regulate all "pollution" resulting from dam operations. *See PUD No. 1*, 511 U.S. at 719-20. And although § 1314(f)(2)(F) addresses *nonpoint* sources of pollution resulting from the activities of "water flow diversion facilities," there is nothing in the statute to indicate that point source

(Cont'd)

intended to place activities that may result in significant water pollution, such as the operation of hydroelectric dam facilities, outside the purview of state regulatory authority. To the contrary, except where it expressly provides otherwise, the Act does not "preclude or deny the right of any State . . . to adopt or enforce . . . any requirement respecting control or abatement of pollution," so long as the State's standards meet or exceed minimum federal standards. 33 U.S.C. § 1370; *see also generally California v. United States*, 438 U.S. 645, 653-63 (1978) (tracing the States' traditional powers over water resources). For these reasons, the term "discharge" in Section 401 should be read consistently with the broader objectives of the Act, to allow States to address the "pollution" caused by hydroelectric dams.

2. Section 401 Authorizes the States to Protect and Enforce Their Water Quality Standards Against the Threats Posed by Hydroelectric Dams.

The Clean Water Act directs each State to develop and achieve water quality standards for each of the water bodies within its borders, and Section 401's certification process provides the States with the mechanism for enforcing those standards.[10] Excluding the activities of hydroelectric dam

(Cont'd)

discharges — such as those from a dam, *see* 33 U.S.C. § 1362(14) — are beyond the Act's reach. *See Miccosukee*, 541 U.S. at 106-07 (noting that § 1314(f)(2) "does not explicitly exempt nonpoint pollution sources from the NPDES program [of Section 402] if they *also* fall within the 'point source' definition").

10. The Act does not "commandeer" state regulatory authority. Rather, it provides that unless a State adopts water quality standards consistent with the Act's requirements, the federal government will determine the standards to be applied in the State. *See* 33 U.S.C. § 1313(b); *cf. New York v. United States*, 505 U.S. 144, 167 (1992) (recognizing "Congress' power to offer States the choice of regulating . . . according to federal standards or having state law pre-empted by federal regulation").

facilities from Section 401 certification would thus compromise the effectiveness of the comprehensive programs established by the States pursuant to the Act to achieve and maintain water quality standards.

The Act directs each State to issue "water quality standards" that generally consist of two major elements: (i) "the designated uses of the navigable waters involved"; and (ii) "the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.10, 131.11. To establish the designated use (or "classification") of each body of water, States must take "into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also tak[e] into consideration their use and value for navigation." 33 U.S.C. § 1313(c)(2)(A); *see also* 40 C.F.R. § 131.10(a). This is a tedious and labor-intensive process. Classifications vary depending on the attributes and purposes served by the water body. New York, for example, designates fresh waters as, *inter alia*, "Class N" (water free of pollutants that may be enjoyed in its "natural condition"), N.Y. Comp. Codes R. & Regs. tit. 6, § 701.2; "Class AA" (water that may be used as a drinking water source after simple disinfection), *id.* § 701.5; "Class B" (water of sufficient quality to allow for contact recreation and fishing), *id.* § 701.7; and "Class D" (water that will allow for fish survival but not fish propagation), *id.* § 701.9.

In addition to designating the uses of each specific water body or stream segment, States are directed by the Act to establish "water quality criteria." 33 U.S.C. § 1313(c)(2)(A). "Criteria are elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use." 40 C.F.R. § 131.3(b). Like the development

of classifications for each body of water, the establishment and continual updating of a State's science-based water quality criteria is a time-intensive undertaking.

After a State has designated the use and water quality criteria applicable to particular bodies of water, it may issue NPDES permits in particular circumstances pursuant to Section 402 to address any discharges of pollutants from point sources into navigable waters. Such permits may impose limitations intended to prevent violations of the water quality standards applicable to the specific receiving water body affected by the discharge. 33 U.S.C. §§ 1342(a)(1), (2), 1311(b)(1)(C); 40 C.F.R. § 122.44(d)(1)(i).

The Act further requires each State to assess its waters and identify each water body that has not yet achieved compliance with the State's water quality standards. 33 U.S.C. §§ 1313(d)(1)(A), (B), 1315. For each non-compliant body, States must develop water pollution budgets and remedial pollutant loading allocations, known as "total maximum daily loads" ("TMDLs"), to address both channeled ("point") and diffuse ("nonpoint") sources of pollutants in an effort to achieve compliance with applicable water quality standards. *Id.* § 1313(d)(1)(C), (D); 40 C.F.R. § 130.7. Once established, the loads assigned to point sources in the TMDL process are incorporated into NPDES permits, as necessary. 40 C.F.R. § 122.44(d)(1)(vii).

Section 401's certification requirement is intended in part to aid in attaining compliance with these water quality standards. *See PUD No. 1*, 511 U.S. at 712-14; *see also id.* at 720 (observing that "concern with the flowage effects of dams and other diversions is . . . embodied in the EPA regulations, which expressly require existing dams to be operated to attain designated uses" (citing 40 C.F.R. § 131.10(g)(4))); *Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 293 (D.C. Cir. 2003)

("The required certification must provide that such discharge will comply with the applicable water quality standards."). Indeed, the express language of Section 401 erases any doubt about the importance Congress placed on the certification requirement: 33 U.S.C. § 1341(a)(1), by reference to 33 U.S.C. § 1313, requires that any applicant for a federal license or permit "shall" provide FERC with a certification from the State that "any . . . discharge will comply with" state water quality standards.

To adopt a cramped reading of Section 401 that effectively removes the activities of hydroelectric dam facilities from the scope of the certification process would subvert Congress' intent to allow the States to assess for themselves whether federally-licensed activities violate the state water quality standards promulgated pursuant to the Act. It would make little sense for the Act to direct States to devise complex and costly water quality standards if, at the same time, the Act were also to place a huge swath of federally-licensed activities that adversely affect water quality – those of hydroelectric dam facilities – beyond the reach of effective state efforts to enforce those standards.

C. Section 401's Legislative History Demonstrates that Congress Specifically Intended It to Apply to Hydroelectric Dams Licensed by FERC.

Despite the clear language of the statute, Petitioner insists that Section 401's use of the term "any discharge" is confined to a "discharge of a pollutant," and that Congress never intended Section 401 to apply to hydroelectric dams (Pet. Br. 25-33). The history of Section 401, however, belies these assertions. Congress first provided in 1970 for state certification where there is "any discharge" into navigable waters. *See* Water Quality Improvement Act of 1970, Pub. L. No. 91-224, § 102, sec. 21(b), 84 Stat. 91, 108

(amending the Federal Water Pollution Control Act) (the "1970 Act"). But it was not until two years later, in 1972, that Congress first required a NPDES permit of Section 402 for the "discharge of any pollutant." Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 816, 880 (codified at 33 U.S.C. §§ 1311(a), 1342(a), (b)).[11] That Congress chose to use different statutory language – "discharge of a pollutant," rather than "any discharge" – when later establishing the NPDES permit requirement underscores that the variant terms are not to be given the same meaning. *See Barnhart*, 534 U.S. at 452.

The claim that Congress did not intend Section 401 to apply to hydroelectric dams is also irreconcilable with additional aspects of the provision's legislative history, which demonstrate that the application of Section 401 to dams was explicitly contemplated by the statute's drafters. As noted, the provision that ultimately became Section 401 was first enacted in 1970 as Section 102 of the 1970 Act (amending Section 21(b) of the Federal Water Pollution Control Act) to assure that federally licensed or permitted activities did not contravene state water quality standards.[12] Using language

11. Indeed, nowhere in the entire text of the Water Quality Improvement Act of 1970 is the term "discharge of a pollutant" found. Nor is there any language in that statute suggesting that the term "any discharge" is circumscribed by the requirement that there be an "addition" to the affected water body.

12. There is no dispute (*see* Pet. Br. 29) that Section 21(b) is Section 401's predecessor. Both the Senate and House Reports on the 1972 Clean Water Act explained that "Section 401 is substantially section 21(b) of the existing law amended to assure that it conforms and is consistent with the new requirements of the Federal Water Pollution Control Act." H.R. Rep. No. 92-911 at 121 (1972); *see* S. Rep. No. 92-414, at 69 (1971). The Senate Report describes the few differences between Section 21(b) and its successor, Section 401(a), but none is relevant here. In particular, there is no suggestion that Section 401 applies a different trigger for certification or a narrower definition of "discharge" than was applied by Section 21(b).

substantially the same as Section 401's language at issue here, the amended Section 21(b)(1) provided:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters of the United States, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that there is reasonable assurance, as determined by the State . . . that such activity will be conducted in a manner which will not violate applicable water quality standards.

Section 102, sec. 21(b), 84 Stat. at 108.

Senator Muskie, the Chairman of the Subcommittee on Air and Water Pollution that developed the 1970 Act and who served as floor manager of the legislation, at the outset of the debate on the final legislation reported from the Conference Committee and adopted into law, stated as follows:

> This provision may be the most important section of this legislation. *I call the Senate's attention to section 21.* This section requires that any applicant for a Federal license or permit obtain certification of reasonable assurance of compliance with water quality standards from a State before that applicant can receive any license or permit.
>
> Any new industry that intends to locate on the navigable waters of the United States; that needs a permit to build a dock, a discharge pipe, a water-intake pipe, a bridge, or a road across

> Federal lands; that requires a license from the Atomic Energy Commission for a nuclear power plant or *a license from the Federal Power Commission* [FERC's predecessor] *to build a dam will be required to obtain this certification of compliance* with water quality standards.

116 Cong. Rec. 8,984 (1970) (on H.R. 4148 after amendment by the Conference Committee) (emphasis added).[13]

Congressman Fallon, the Chairman of the Committee on Public Works and floor manager of the 1970 Act, during debate on the final legislation as reported from the Conference Committee, likewise stated that the 1970 Act would require that:

> proper certification be received from those who would use our Nation's waters and in the process must obtain a Federal license or permit, that they give reasonable assurance of compliance with water quality standards for a State or States before that applicant can receive any license or permit. *This includes among others a license* from the Atomic Energy Commission for a nuclear powerplant or *for any new dam which requires a license or* [sic] *from the Federal Power Commission*, as well as many other industries which would require a permit to build a dock[,] discharge pipe, a water intake pipe, or a bridge.

116 Cong. Rec. 9332 (1970) (on H.R. 4148 after amendment by the Conference Committee) (emphasis added).

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13. For purposes of Section 401, there is no basis to distinguish between FERC's licensing of new hydroelectric dams and the licensing of existing dams. Section 401(a)(1) plainly applies to both; (Cont'd)

Similarly, Senator Cooper, the ranking member of the Committee on Public Works from which the 1970 Act originated, with regard to S.7, the earlier Senate version of the 1970 Act, stated:

> Indirectly, the Federal Government contributes to water pollution in its licensing activities over such things as nuclear power plants, *hydroelectric power plants licenced by the Federal Power Commission* and dredge and fill permits issued by the Army Corps of Engineers. . . .
>
> With respect to *Federal licensing activity, the bill S.7 requires that, as a part of the license activity, applicants must furnish certification from the State* and affected States that the activity will comply with applicable water quality standards.

115 Cong. Rec. 28,971 (1969) (emphasis added); *see also* 116 Cong. Rec. 9,005 (1970) (statement of Senator Cooper concerning "significant risks to water quality" associated with "most licenses issued by . . . the Federal Power Commission").

The statements of Senators Muskie and Cooper, as well as that of Congressman Fallon, establish that Congress clearly intended that the inclusion of the term "any discharge" in Section 401 of the Act would encompass the activities of hydroelectric dam facilities.

(Cont'd)

it reaches the "construction or *operation* of facilities." 33 U.S.C. § 1341(a)(1) (emphasis added). Moreover, "refusing to relicense a hydroelectric project would result in the disassembly of the project," as opposed to the preservation of the *status quo*. *American Rivers, Inc. v. FERC*, 129 F.3d 99, 111 (2d Cir. 1997); *see also* 33 U.S.C. § 1341(a)(6) (pre-existing facilities are not exempt from Section 401's certification requirement); *FPL Energy Maine Hydro LLC*, 111 F.E.R.C. P61,104, ¶ 25 (2005) ("relicensing is an activity that may result in a discharge because, without a new license, the discharge will not be authorized to continue").

II. THIS COURT'S ANALYSIS OF SECTION 401 IN *PUD No. 1*, NOT ITS DISCUSSION OF SECTION 402 IN *MICCOSUKEE*, IS RELEVANT TO WHETHER THE OPERATION OF A HYDROELECTRIC DAM MAY RESULT IN A DISCHARGE FOR PURPOSES OF SECTION 401.

This Court's decision in *PUD No.1* makes clear that the operation of the hydroelectric dams presently under review results in a "discharge" within the meaning of Section 401 of the Act. Petitioner's effort to draw the Court's attention instead to *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), is misplaced because that case concerns a different provision of the Act, Section 402.

A. *PUD No. 1* Confirms that Hydroelectric Dams Cause a Section 401 "Discharge."

Like this case, *PUD No. 1* involved a state certification for a hydroelectric dam issued pursuant to Section 401. *See* 511 U.S. at 708-09. Addressing the need for state certification, the Court observed that operation of the dam would result in "the discharge of water at the end of the tailrace after the water has been used to generate electricity." *Id.* at 711. In the Court's view, such "discharge" – the same as that which results from the operation of Petitioner's dams in the present case (*see* Pet. Br. 3-4) – warranted the conclusion that the operators of the dam "were required to obtain a certification from the State pursuant to § 401." 511 U.S. at 711. That reasoning should control here.

The petitioners in *PUD No. 1* did not dispute that the discharge of water from the tailrace constituted "any discharge" for purposes of Section 401. *See id.* at 711

("Petitioners concede that, at a minimum, the project will result in two possible discharges . . . ."). Significantly, however, the Court did not assume *arguendo* that a hydroelectric dam required state certification under Section 401. Rather, it stated unequivocally — and, in the first instance, without reference to the petitioners' concession of the point — that "because the [hydroelectric dam] project may result in discharges into the Dosewallips River, petitioners are . . . required to obtain state certification of the project pursuant to § 401." *Id.* at 709. Only when the Court later reiterated the need for state certification did it observe that there was "no dispute" as to that need. *Id.* at 711.

The Court's conclusion that the activity of a hydroelectric dam facility results in a Section 401 "discharge" cannot reasonably be dismissed as dicta (*cf.* Pet. Br. 22 n.4). As the Court held in *PUD No. 1*, the existence of a "discharge" is a necessary predicate to a State's exercise of certification authority under Section 401: "Section 401(a)(1) identifies the category of activities subject to certification — namely, those with discharges. And § 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied." 511 U.S. at 711-12. Thus, the Court's determination that a discharge was indeed present was a necessary "threshold condition" to *PUD No. 1*'s ultimate conclusion that the certification challenged there was permissible. The Court's construction of Section 401 as including discharges from hydroelectric dams should be given *stare decisis* effect. *See, e.g., California v. FERC*, 495 U.S. 490, 499-501 (1990) (adhering to precedent where

Court's previous "limited reading" of statute was "necessary for, and integral to" its prior conclusion).[14]

B. *Miccosukee*'s Analysis of Section 402's Narrower Standard, "Discharge of Pollutants," Is Not Relevant Here.

Petitioner's reliance (Pet. Br. 20-21) on *Miccosukee* is misplaced. *Miccosukee* did not involve the certification requirement of Section 401 implicated by "any discharge," but rather Section 402's NPDES permit requirement for point source "discharges of pollutants," a term more narrowly drawn than the open-ended "discharge" referenced in Section 401.

Because the statutory definition of "discharge of pollutants" under Section 402 expressly requires some "addition" to navigable waters, *see* 33 U.S.C. § 1362(12), this Court in *Miccosukee* inquired whether the "pollutants" at issue there were already within the subject water body, or whether they were added, via a point source, from a "meaningfully distinct" water body. 541 U.S. at 109-112. But that inquiry is not relevant to the Section 401 analysis required here, because as discussed in Point I.A., *supra*, Section 401's use of the term "any discharge" does not require that there be an "addition" to any navigable waters. Thus, state certification may be required under Section 401 even

14. The dissenting opinion in *PUD No. 1* also construed the statutory term "discharge" in a manner that encompasses the discharge of water from a dam. *See* 511 U.S. at 725 (Thomas, J., dissenting) ("The term 'discharge' is not defined in the CWA, but its plain and ordinary meaning suggests 'a flowing or issuing out,' or 'something that is emitted.'"(quoting Webster's Ninth Collegiate Dictionary 360 (1991))). Nowhere did the dissenting opinion suggest that an "addition" is a necessary element of any "discharge," or that the definition of "discharge of a pollutant" somehow circumscribes the full extent of the term "discharge."

where there has been no addition of a pollutant — or anything else — from a distinct water body.[15]

Instead of looking to *Miccosukee* for guidance, this Court should adhere to the understanding of Section 401 developed in *PUD No. 1*. Had Congress intended, as Petitioner contends, to define Section 401's use of the term "any discharge" to require some addition to a water body, it easily could have done so, as it in fact did in defining "discharge of pollutants" for purposes of Section 402. *See* 33 U.S.C. § 1362(12). But Congress placed no such limitation on Section 401's threshold condition for state certification, and with good reason. As explained in Point I.B.2, *supra*, the state water quality standards safeguarded by Section 401 are jeopardized not only by "additions" but by "any activity" – such as the operation of hydroelectric dam – that may degrade the chemical, biological, and physical integrity of affected waters. Petitioner's effort to import *Miccosukee*'s construction of Section 402 to the distinct and more expansive language of Section 401 misses this critical point. If Petitioner's arguments are accepted, the States will be left with no means to confront potentially devastating threats to water quality standards, and Congress' express policy recognizing the States' "primary responsibilities and rights" of preventing water "pollution" will be thwarted. 33 U.S.C. § 1251(b).

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15. For this reason, *Consumers Power* and *Gorsuch* are inapposite, contrary to Petitioner's assertion. *See* Pet. Br. 23, 25. Those cases grappled with the application of Section 402's permit requirement to dams, where an "addition" is required by the text of the statute setting forth the NPDES permit requirement for point sources of pollutants. *See* 33 U.S.C. §§ 1342, 1362(12). However, no "addition" is necessary to trigger the certification process of Section 401. *See supra*, Point I.A.

CONCLUSION

For the foregoing reasons, the judgment of the Maine Supreme Judicial Court should be affirmed.

Respectfully submitted,

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